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No. 95-1532

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CHARLES W. LINDENMEIER, et al.
PETITIONERS,

vs.

SIEMENS POWER CORPORATION, et al.
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY

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STATUTES, RULES AND REGULATIONS

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PETITIONERS' REPLY

THE NINTH CIRCUIT DID NOT ANTICIPATE THIS COURT'S RULING IN *VARITY CORP. v. HOWE* WHEN IT AFFIRMED DISMISSAL OF PETITIONERS' BREACH OF FIDUCIARY DUTY CLAIM.

Petitioners will be denied the protections established in *Varity Corp. v. Howe*, 116 S.Ct. 1065 (1996) unless their Petition for Writ of Certiorari is granted, and this case is reversed and remanded to the lower courts for further proceedings.[1] Petitioners

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[1]The Petition may be decided by "a summary disposition on the merits." S. Ct. Rule 16

informed the court of appeals that this Court was considering the viability of a breach of fiduciary duty claim under the Employee Retirement Income Security Act of 1974 ("ERISA"). Appendix ("App.") 89a; Brief in Opp. 16. Nevertheless, the court of appeals issued its Memorandum Decision against Petitioners before *Varity* was decided. App. 11a, 13a & 14a.

RESPONDENTS OBSCURE PETITIONERS' DIFFERENT CLAIMS IN THEIR COMPLAINT.

Petitioners pled multiple claims in their complaint including breach of plan terms (App. 57a-58a) and breach of fiduciary duty. *Id.* 61a-63a. The court of appeals affirmed dismissal of Count One for breach of plan terms relying, in part, on *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223, 1229 (1995) (reservation of rights clause). App. 6a. Petitioners do not seek review of the dismissal of Count One.

Respondents suggest that Petitioners' breach of fiduciary duty claim also fails under *Curtiss-Wright*. Brief in Opp. 7-9. However, dismissal of Count One of the complaint because the plan documents were found to contain unambiguous language of a reservation of rights clause does not foreclose Petitioners' separate claim in Count Six for relief based on breach of fiduciary duty arising from the same set of circumstances. *In Re: Unisys Corp. Retiree Medical Benefit ERISA Litigation*, 57 F.3d 1255, 1264 n.13 (3rd Cir. 1995), *cert. denied*, 116 S.Ct. 1316 (1996). *Curtiss-Wright* does not apply on this issue. *Varity*, 116 S.Ct. at

1074 (distinguishing *Curtiss-Wright* and observing that "plan administrators often have, and commonly exercise, discretionary authority to communicate with beneficiaries about the future of plan benefits.")

AS IN *VARITY*, EXXON NUCLEAR COMPANY, INC. PURSUED A COMMUNICATION CAMPAIGN TO PERSUADE ITS EMPLOYEES TO ACCEPT THE COMPANY'S MESSAGE ABOUT THEIR FUTURE BENEFITS.

Respondents try unsuccessfully to distinguish this case from *Varity*. Brief in Opp. 9-11. In *Varity* the employees were summoned to a videotaped presentation and received literature from the company discussing employee benefits and benefit plans in order to induce the employees to transfer to the new employer. *Varity* at 1069 & 1071-72. Correspondingly, Exxon Nuclear Company, Inc. ("ENC") organized employee meetings with Vugraph charts and circulated written materials about benefits to the employees before and after the stock sale. App. 43a-53a. Through its communication campaign *Varity* encouraged employees to transfer to the new employer in order to save money misleading the employees about the security of their benefits with the new employer. *Varity* at 1068-69. Likewise in the present matter, ENC and the other Respondents wanted to maintain the talented labor force for the success of the sale and continued success of ENC. App. 43a-45a.

This Court concluded in *Varity* that the company

acted in its fiduciary capacity when it deliberately made oral and written misrepresentations to the employees (*Varity* at 1072-73) and that the company breached its fiduciary duty to act solely in the interest of beneficiaries and participants. *Id.* at 1074-75. Similar allegations are made in Count Six of Petitioners' complaint for breach of fiduciary duty. App. 61a (incorporating by reference prior fact allegations in the complaint) - 63a.

RESPONDENTS DELIBERATELY CONCEALED FROM ENC EMPLOYEES THAT THEY COULD CHANGE EMPLOYEE BENEFITS SIX MONTHS AFTER THE STOCK SALE DESPITE CONTRARY REPRESENTATIONS TO ENC EMPLOYEES.

Respondents incorrectly assert that *Varity* issues are not present in this case. Brief in Opp. 12-15. Remarkably, Respondents now admit in their Brief in Opposition that "in the Acquisition Agreement... the new shareholder had an obligation to provide comparable (not identical) benefits *only for a six month period* following the acquisition in 1986: ..."(emphasis in original). Brief in Opp. 2 n.1.[2] This statement

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[2]This alleged "Acquisition Agreement" is entitled Stock Purchase Agreement between Exxon Corporation and Kraftwerk Union Aktiengesellschaft and dated is December 19, 1986. Excerpts of this alleged Stock Purchase Agreement were produced by Respondents as part of their Reply Memorandum In Support of Motion to Dismiss. Petitioners were prevented from conducting any meaningful discovery in this case and were unable to investigate further the Stock Purchase Agreement.

contradicts the oral and written representations concurrently disseminated to its employees by ENC at that time. App. 43a-53a. Neither Respondents' admission or the alleged Stock Purchase Agreement was disclosed to ENC employees revealing the six month time limit on changing benefits to ENC employees.

Instead, ENC (and later other Respondents) assured its employees that their pension and welfare benefits would remain the same as or equal to the benefits previously provided and that the benefits would vest upon the attainment of "annuitant status" which was defined as 55 years of age and 15 years of employment. App. 43a-53a. Relying upon these representations, the employees remained with ENC through the stock sale forgoing other employment opportunities. *Id.* 33. By failing to disclose to the employees Respondents' view that employee benefits were subject to change six months after the stock sale, Respondents' oral and written representations to ENC employees about their future benefits were rendered materially misleading. *Varity* at 1074. ENC and the other Respondents intentionally deceived the employees to preserve the talented work force for the success of the sale and ENC, and thereby breached their fiduciary obligations to the ENC employees under ERISA.

In *In Re: Unisys Corp. Retiree Medical Benefit ERISA Litigation*, the Third Circuit defined the elements of an employer's fiduciary duties in communicating about plan benefits:

> Our decisions in *Bixler*, *Fischer*, *Curcio* and *Smith* firmly establish that when a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries.

In Re: Unisys Corp. Retiree Medical Benefit ERISA Litigation, 57 F.3d at 1264.

> Given these findings, we hold that the district court did not err as a matter of law in concluding that the duty did convey complete and accurate information that was material to its employees' circumstance arose from these facts since the trustees had to know that their silence might cause harm. The district court's findings that the company actively misinformed its employees by affirmatively misrepresenting to them that their medical benefits were guaranteed once they retired, when in fact the company knew this was not true and that employees were making important retirement decisions relying upon this information, clearly support a claim for breach of fiduciary duty under ERISA.

Id. at 1266-67.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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